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Manhattan College and Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO. Case 02-CA-201623

April 27, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on June 29, 2017, by Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO (the Union), the General Counsel issued the complaint on September 19, 2017, alleging that Manhattan College (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 02-RC-023543. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On October 4, 2017, the General Counsel filed a Motion for Summary Judgment. On October 17, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 14, 2017, the Respondent filed an Opposition to the Motion for Summary Judgment. On December 1, 2017, the General Counsel filed a Reply to the Opposition. On January 4, 2018, the Respondent filed a Sur-Reply to the General Counsel's Reply. On February 21, 2018, the General Counsel filed a limited response to the Respondent's Sur-Reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board lacks jurisdiction over Manhattan College as a religiously-affiliated university and that the Board's test for asserting its jurisdiction, as set forth in *Pacific Lu-*

theran University, 361 NLRB 1404 (2014), constitutes an unconstitutional intrusion into the Respondent's religious liberty.¹

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a private nonprofit college, with a facility located at 413 Manhattan College Parkway, Bronx, New York, that has been engaged in the operation of a higher education institution.

Annually, the Respondent, in the course and conduct of its business operations has a gross annual operating revenue exceeding \$1 million. Annually, the Respondent, in the course and conduct of its business operation receives in excess of \$50,000 in income from the State of New York, an entity which is directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the mail ballot representation election where ballots were mailed to eligible employees on February 16, 2011, the Union was certified on June 14, 2017,² as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

¹ Member Emanuel did not participate in the underlying representation proceeding. He expresses no opinion on the merits of the Board's decision in that proceeding or on whether *Pacific Lutheran University*, supra, was correctly decided. Nonetheless, he agrees with his colleagues that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

² By an unpublished order dated April 20, 2017, the Board issued an Order excluding adjunct faculty working the Department of Religious

All individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course), excluding adjunct faculty in the Department of Religious Studies, all other full and part-time employees, including visiting and full time faculty, regardless of teaching load, students who are employed by the College, and guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated June 14, 2017, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. By letter dated July 12, 2017, the Respondent refused to recognize and bargain with the Union and indicated that it would challenge the certification of the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since July 12, 2017, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229

(1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Manhattan College, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course), excluding adjunct faculty in the Department of Religious Studies, all other full and part-time employees, including visiting and full time faculty, regardless of teaching load, students who are employed by the College, and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its New York, New York facility, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or cov-

Studies from the unit found appropriate and denied the Respondent's request for review in all other aspects. *Manhattan College*, Case 02-RC-023543, 2017 WL 1434209.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 27, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course), excluding adjunct faculty in the Department of Religious Studies, all other full and part-time employees, including visiting and full time faculty, regardless of teaching load, students who are employed by us, and guards and supervisors as defined in the Act.

MANHATTAN COLLEGE

The Board's decision can be found at www.nlr.gov/case/02-CA-201623 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

